Nos. 12774, 12791, 12792, 12793, 12798, 12799, 12800, and 12802

In the United States Court of Appeals for the Ninth Circuit

OREGON-WASHINGTON PLYWOOD COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

WHEELER, OSGOOD CO., PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

NORTHWEST DOOR COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

WASHINGTON VENEER CORPORATION, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

DOUGLAS FIR PLYWOOD ASSOCIATION ET AL., PETITIONERS
v.
FEDERAL TRADE COMMISSION, RESPONDENT

PACIFIC MUTUAL DOOR COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

WEST COAST PLYWOOD COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

M. AND M. WOOD WORKING COMPANY, PETITIONER
v.
FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITIONS TO REVIEW AN ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT AND APPENDIX

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In the United States Court of Appeals for the Ninth Circuit

No. 12774, No. 12791, No. 12792, No. 12793, No. 12798, No. 12799, No. 12800, and No. 12802

OREGON-WASHINGTON PLYWOOD COMPANY *v.* FEDERAL TRADE COMMISSION; WHEELER, OSGOOD CO. *v.* FEDERAL TRADE COMMISSION; NORTHWEST DOOR COMPANY *v.* FEDERAL TRADE COMMISSION; WASHINGTON VENEER CORPORATION *v.* FEDERAL TRADE COMMISSION; DOUGLAS FIR PLYWOOD ASSOCIATION *et al.* *v.* FEDERAL TRADE COMMISSION; PACIFIC MUTUAL DOOR COMPANY *v.* FEDERAL TRADE COMMISSION; WEST COAST PLYWOOD COMPANY *v.* FEDERAL TRADE COMMISSION; M. AND M. WOOD WORKING COMPANY *v.* FEDERAL TRADE COMMISSION

ON PETITIONS TO REVIEW AN ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT

I

JURISDICTION

This is a case arising upon petitions to review an order to cease and desist issued in an administrative proceeding conducted by the Federal Trade Commission, respondent, on an amended Commission complaint charging petitioners with engaging in acts hindering and preventing competition in the sale of

plywood products in interstate commerce, and unreasonably restraining such commerce in plywood products, in violation of Section 5 of the Federal Trade Commission Act.[1]

II

STATEMENT OF THE CAS

A. The pleadings

The proceedings below were conducted pursuant to an amended complaint (Tr. 35) issued by the Commission on May 19, 1949, against petitioners herein, the Buffelen Manufacturing Co. (a California corporation) and Harrison Clark (an individual). The trial examiner, on September 30, 1949, dismissed the complaint as to Buffelen Manufacturing Co. (R. 242), and the Commission, in its final order, dismissed the complaint as to Harrison Clark in his individual capacity, but not as an officer of petitioner Douglas Fir Plywood Association (Tr. 128). The eighteen petitioners (respondents before the Commission) are thirteen corporations engaged in the manufacture and sale of plywood products, their corporate trade association, their unincorporated

[1] "Sec. 5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." 52 Stat. 111–112; 15 U. S. C. § 45 (a).

"(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 52 Stat. 112–113; 15 U. S. C. § 45 (c).

information bureau, two corporate manufacturers of plywood not affiliated with the trade association, but cooperating with it in the acts alleged, a corporate manufacturer of plywood which formerly subscribed to the trade association, and an individual petitioner, Wallace E. Difford (the former managing director of the trade association).

Paragraph Seven of the amended complaint (Tr. 50–51) charged that those petitioners who manufacture and sell plywood, acting in cooperation with each other, and through and in cooperation with the petitioner association, its officers and management, and through and in cooperation with the petitioner information bureau and with individual petitoner Wallace E. Difford, and each of them, for a substantial portion of the period ensuing upon January 1936, had engaged in an understanding, agreement, combination, conspiracy, and planned common course of action among themselves and with and through the association, the information bureau and petitioner Difford, to restrict, restrain, and suppress competition in the sale and distribution of plywood products to customers located throughout the several States, by agreeing to fix and maintain prices, terms, and discounts at which their plywood products were to be sold, and to cooperate with each other in the enforcement and maintenance of those fixed prices, terms, and discounts, by exchanging information through the association and the information bureau as to the prices at which the companies had sold and were offering to sell plywood products to customers and prospective customers.

The complaint alleged further, in Paragraph Eight (Tr. 51–54), that pursuant to the said understanding, combination, conspiracy, etc., and in furtherance thereof, the petitioners did the following:

(1) Agreed to and did curtail the production of plywood;

(2) Compiled statistical information in respect to production, sales, shipments, and orders on hand, which information was made available to petitioners but which was denied to the purchasing trade;

(3) Adopted and used a uniform basic price list containing uniform net extras to be charged therein and uniform discounts to be extended therefrom;

(4) Compiled and used lists of buyers entitled to receive a so-called jobber's discount of 5 percent;

(5) Adopted and used a so-called functional compensation plan of distribution that included: (a) Issuance of uniform net dealers' prices carrying uniform prices on different quantities and a uniform cash discount; (b) issuance of identically worded compensation schedules embodying definitions of trade factors, and providing for the functional discount under prescribed conditions as to who may receive and under what conditions same may be granted; and adopted an unpublished agreement interpreting the plan, which agreement provided that a buyer doing less than 40 percent of its business at wholesale would be considered a dealer under the plan; (c) establishment of an information bureau to develop information as to the trade status of buyers, which applied the secret requirement of 40 percent wholesale in determining the status of buyers under the plan and which

transmitted to member petitioners and subscriber petitioners conclusions and findings as to the status of buyers;

(6) Adopted arbitrarily rules providing that the Government and certain industrial buyers would be required to pay dealers' prices, and that certain specified classes of industrial buyers would receive a 5 percent discount from the dealer's price;

(7) Acted to insure the success of the plan and to compel compliance therewith, by holding meetings with distributors for the purpose of forcing or inducing adherence to the price and discount provisions; inviting distributors to submit information in reference to suspected deviations from the plan by manufacturers or others; acting through the petitioner association to conduct general investigations of the members' files or to investigate specific instances of reported violations; establishing the petitioner association as an intermediary to place business among the member petitioners; using mill numbers to identify the source of manufacture in cases of reported deviation from the plan; providing in the agreement licensing manufacturers to use the trade-marks obtained by the petitioner association that same could be used only on grades approved by the petitioner association;

(8) Threatened to, sought to, and did cut off the supply of distributors who failed or refused to adhere to prices or classification provisions;

(9) Quoted only on a delivered-price basis and in conjunction therewith computed the rail freight from Tacoma, Washington, irrespective of the origin of

shipment or the rate applicable thereto; and used a uniform schedule of estimated weights which were higher than actual weights and which, when used in connection with a fixed base price and a single basing-point, assured the industry of uniform delivered price quotations to buyers;

(10) Shipped by water to East Coast and Gulf points only on a C. I. F. basis; and

(11) Applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market.

The capacity, tendency, and results of petitioners' combination and conspiracy, and of the acts committed pursuant thereto—so the amended complaint charged—were:

(a) To interfere with and curtail the production of plywood products and the sale of same in interstate commerce to dealers therein who, but for the existence of said understanding, agreement, combination, conspiracy, and planned common course of action, would be able to purchase their requirements of the said products from the manufacturers thereof;

(b) To force many dealers in plywood products to discontinue the sale of said products because of their inability to obtain them from manufacturers or to maintain a supply thereof at reasonable prices;

(c) To substantially increase the price of said plywood products to wholesalers, retailers, and to the consuming public;

(d) To substantially increase the price of said products when sold to the Government and to certain industrial buyers who, but for the understanding,

agreement, combination, conspiracy, and planned common course of action, would be able to secure their requirements of said plywood products at substantially lower prices; and

(e) To concentrate in the hands of petitioners the power to dominate and to control the business policies and practices of the manufacturers and distributors of plywood products, and the power to exclude from the industry those manufacturers and distributors who do not conform to the rules, regulations, and requirements established by petitioners, and thus to create a monopoly in said member and subscriber, former subscriber, and nonaffiliate petitioners in the sale of said plywood products.

The complaint concluded by reciting that the foregoing acts and practices were all to the prejudice of petitioners' competitors and of the public; had a dangerous tendency to hinder and prevent and had actually hindered and prevented competition in the sale of plywood products in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act; had unreasonably restrained such commerce in plywood products; and constituted unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Petitioner association, petitioner bureau, eleven of petitioner manufacturers and sellers of plywood (Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, M. & M. Wood Working Company, United States Plywood Corporation, Vancouver Plywood & Veneer Company,

Washington Veneer Company, West Coast Plywood Company, The Wheeler, Osgood Company, Robinson Plywood and Timber Company, and Pacific Mutual Door Company), and the individual petitioner, Wallace E. Difford, all filed answers to the amended complaint (Tr. 59, 63, 64, 66, 68, 74, 75, 77, 79, 82, 84, 87, 94) which admitted "in order to expedite this proceeding and to prevent the business disorganization consequent upon litigation, and expense incident to trial"—

> all of the material allegations of fact set forth in said complaint, providing this admission be taken to mean that the understanding, agreement, combination, conspiracy, and planned common course of action alleged in Paragraph Seven of the amended complaint existed and continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period May, 1935, to August 1, 1941, and not otherwise,

and which, except to the extent of such admission—

> [denied] all of the material allegations of fact set forth in the complaint, and [waived] all intervening procedure and further hearing as to the said facts.

Petitioner Northwest Door Company filed an answer (Tr. 70) admitting that it had cooperated with the other petitioners in only the activities specified in Paragraph Seven and in subdivisions (2), (3), (5) (a), (5) (b), part of (7), (9), (10), and (11) of Paragraph Eight of the amended complaint (pp. 4–7,

ante), subject to the same limitations as those set forth in the paragraphs just quoted.

Petitioner Oregon-Washington Plywood Company by its answer to the amended complaint (Tr. 72) admitted all material allegations of fact in the amended complaint, but denied that—

> the understanding, agreement, combination, conspiracy, and common course of action alleged in the amended complaint, or * * * any agreement or understanding between this [petitioner] and any of the other [petitioners] named in the amended complaint, to fix or control prices or limit production of plywood or any commodities, continued or existed for any period of time subsequent to August 31, 1941,

and subjected these averments to the same limitations as those set forth in the paragraphs quoted above.

Petitioner Anacortes Veneer, Inc., admitted (Tr. 81) all allegations of fact set forth in Paragraph Two, subparagraph (13) of the amended complaint[2] sub-

[2] "Respondent Anacortes Veneer, Inc., is a corporation organized and existing under the laws of the State of Washington with its principal office and place of business located at Anacortes, Washington. Said respondent began operations November 23, 1939. On December 4, 1939, said respondent became a subscriber to said respondent Association, and on December 12, 1939, said respondent issued Dealer Price List Number 39–B, containing identical prices, terms, and conditions as shown in Dealer Price List Number 39–B issued by other members and subscribers to respondent Association. Said respondent also issued on December 5, 1939, and [made] effective on that date, in connection with its Dealer Price List Number 39–B, a Wholesale Functional Service Compensation Schedule identical in form, language, terms, conditions, and provisions with Wholesale Functional Service Compensation Schedules issued and used by all other members of and subscribers to said respondent Association and in connection with the use

ject to the limitations set forth in the paragraphs quoted on page 8, *ante,* and denied all other material allegations of fact.

Petitioner Weyerhaeuser Sales Company admitted (Tr. 85)—

> that it cooperated in the activity set forth in Paragraphs Four and Seven and in Subdivisions (3), (4), (5), (10), and (11) of Paragraph Eight of said amended complaint; provided this admission be taken to mean that the cooperation admitted hereinabove in this answer continued only for a substantial part of the period of time charged in the amended complaint, to wit, for a substantial part of the period of time from May, 1935, to August 1941, and not otherwise; and except to the extent of such admission, denies all of the material allegations of fact set forth in the amended complaint, and specially denies the allegations of Subdivision (1), (2), (6), (7), (8), and (9) of Paragraph Eight thereof,

but consented that any "order entered by the Commission may prohibit as to said [petitioner] any or all of the acts alleged by Paragraphs Seven and Eight of the amended complaint to be illegal."

By their answers to the amended complaint, all the petitioners waived "all intervening procedure and further hearing as to the said facts" and provided further that—

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thereof, said respondent made use of the services of the respondent Douglas Fir Plywood Information Bureau. Said respondent has been since December 4, 1939, and now is a subscriber to said respondent Association, and has been since June 1947, and now is a member of said respondent Association." (Tr. 46–47.)

> any and all admissions of fact made by [petitioners] are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding, and enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

On September 30, 1949, the trial examiner closed the taking of testimony, reception of evidence and all other proceedings before him in the matter (Tr. 90). Thereafter, on November 14, 1949, petitioner Oregon-Washington Plywood Company filed a motion to dismiss the amended complaint (Tr. 92); and on December 23, 1949, petitioner The Wheeler, Osgood Company likewise filed a motion to dismiss the amended complaint (R. 263). Both motions were denied by the Commission on October 20, 1950 (R. 268 and 270).

B. The findings and the order

Having received briefs supporting and opposing the complaint and heard oral argument, the Commission on October 20, 1950, announced its findings as to the facts and its conclusion therefrom (Tr. 96) and issued its order to cease and desist (Tr. 123).

The Commission found that the following corporate petitioners were members of, and subscribers to, peti-

tioner Douglas Fir Plywood Association (Paragraph Two; Tr. 101–106):

Associated Plywood Mills, Inc.,
Elliott Bay Mill Company,
Harbor Plywood Corporation,
M. & M. Wood Working Company,
Oregon-Washington Plywood Company,
United States Plywood Corporation,
Vancouver Plywood & Veneer Company,
Washington Veneer Company,
West Coast Plywood Company,
The Wheeler, Osgood Co., and
Anacortes Veneer, Inc.;

that these "member" petitioners had agreed to pay 35¢ per thousand square feet of plywood production for petitioner association to spend for trade promotion purposes and were licensed by petitioner association to use trade-marks and trade names owned by the association under certain conditions (Paragraph Two (n); Tr. 106–107).

The Commission also found that petitioner Robinson Plywood and Timber Company was a subscriber to petitioner association until December 31, 1946 (Paragraph Three; Tr. 103).

The Commission found that the following petitioners, though not affiliated with petitioner association, cooperated with it, petitioner information bureau, and the "member" petitioners, in many of the activities occasioning this proceeding (Paragraph Four; Tr. 107–108):

Pacific Mutual Door Company, and
Weyerhaeuser Sales Company.

It was further found that individual petitioner Wallace E. Difford was managing director of petitioner association from March 8, 1938, until June 30, 1946, and in that capacity, initiated, supervised, and carried out many of the association's policies and cooperated with the other petitioners in the activities found to be illegal (Paragraph Five; Tr. 108).

The Commission found that all the member, former member, and non-affiliate petitioners manufacture plywood products and sell and distribute them in interstate commerce, and, during the time covered by the findings, were competing with others in the manufacture and sale of their products in commerce, and except for the facts would be in free, active, and substantial competition with each other (Paragraph Six; Tr. 108–109).

The Commission found also that all the petitioners had, during a substantial part of the period from May, 1935, to August 1, 1941, engaged in a combination and conspiracy—

> to restrict, restrain, and suppress competition in the sale and distribution of plywood products * * * by agreeing to fix and maintain prices, terms, and discounts at which said * * * products were to be sold, and to cooperate with each other in the enforcement and maintenance of the prices, terms, and discounts so fixed * * *. [Paragraph Seven; Tr. 109–110.]

The Commission found (Paragraph Eight; Tr. 110–113) that all the petitioners except Northwest Door Company, Anacortes Veneer, Inc., and Weyerhaeuser

Sales Company, during the period between May, 1935, and August 1, 1941, in pursuance of their conspiracy, had done among other things the following acts:

(1) Agreed to and did curtail the production of plywood;

(2) Compiled statistical information in respect to production, sales, shipments, and orders on hand, which information was made available to petitioners but which was denied to the purchasing trade;

(3) Adopted and used a uniform basic price list containing uniform net extras to be charged therein and uniform discounts to be extended therefrom;

(4) Compiled and used lists of buyers entitled to receive a so-called jobber's discount of 5 percent;

(5) Adopted and used a so-called functional compensation plan of distribution that included: (a) Issuance of uniform net dealers' prices carrying uniform prices on different quantities and a uniform cash discount; (b) issuance of identically worded compensation schedules embodying definitions of trade factors, and providing for the functional discount under prescribed conditions as to who may receive and under what conditions same may be granted; and adopted an unpublished agreement interpreting the plan, which agreement provided that a buyer doing less than 40 percent of its business at wholesale would be considered a dealer under the plan; (c) establishment of an information bureau to develop information as to the trade status of buyers which applied the secret requirement of 40 percent wholesale in determining the status of buyers under the plan and which transmitted to member petitioners and sub-

scriber petitioners conclusions and findings as to the status of buyers;

(6) Adopted arbitrarily rules providing that the Government and certain industrial buyers would be required to pay dealers' prices, and that certain specified classes of industrial buyers would receive a 5 percent discount from the dealers' price;

(7) Acted to insure the success of the plan, and to compel compliance therewith, by holding meetings with distributors for the purpose of forcing or inducing adherence to the price and discount provisions, inviting distributors to submit information in reference to suspected deviations from the plan by manufacturers or others, acting through the petitioner association to conduct general investigation of the members' files or to investigate specific instances of reported violations, establishing the petitioner association as an intermediary to place business among the member petitioners, using mill numbers to identify the source of manufacture in cases of reported deviation from the plan, providing in the agreement licensing manufacturers to use the trade-marks obtained by the petitioner association that same could be used only on grades approved by the petitioner association;

(8) Threatened to, sought to, and did, cut off the supply of distributors who failed or refused to adhere to prices or classification provisions;

(9) Quoted only on a delivered-price basis and in conjunction therewith computed the rail freight from Tacoma, Washington, irrespective of the origin of shipment or the rate applicable thereto, and used a uniform schedule of estimated weights which were

higher than actual weights and which, when used in connection with a fixed base price and a single basing point, assured the industry of uniform delivered price quotations to buyers;

(10) Shipped by water to East Coast and Gulf points only on a C. I. F. basis; and

(11) Applied a uniform net addition to the ocean freight rate on water shipments, and a uniform net addition on sales made in the primary market.

The Commission also found that petitioner Northwest Door Company during the same period had committed, out of eleven acts and practices found to have been engaged in by petitioners previously named and listed at pages 14–16, *ante,* those specified in Paragraphs (2), (3), (5) (a), (5) (b), (7), (9), (10), (11), of the findings (summarized at pp. 14–16, *ante*), and that Weyerhaeuser Sales Company had committed the acts and practices charged in the complaint and set forth in Paragraphs Three, Four, Five, Ten, and Eleven (summarized at pp. 14 and 16, *ante*).

It found that Anacortes Veneer, Inc., had participated in the combination and conspiracy charged, by issuing on December 5, 1939, a price list containing prices, terms and conditions shown by a price list issued by the member petitioners; on the same date issued a Wholesale Functional Service Compensation Schedule identical with schedules issued and used by the member petitioners; and in connection therewith, utilized the services of the petitioner information bureau.

The Commission, in its findings, rejected the contention of petitioner Anacortes Veneer, Inc., to the effect

that the facts admitted by it in its answer were insufficient to implicate it in the combination and conspiracy found to exist among the other petitioners. The Commission consequently found that Anacortes Veneer, Inc., was also a participant in the unlawful combination and conspiracy and that its acts were all done pursuant thereto and in furtherance thereof.

The Commission also found that the capacity, tendency, and results of the petitioners' unlawful scheme and the acts done thereunder and pursuant thereto, were as charged in the complaint and quoted at pages 6–7, *ante*.

The Commission concluded that petitioners' acts and practices, as found, were "all to the prejudice and injury of the public and of competitors of said [petitioners]; have had a dangerous tendency to and have actually hindered and prevented competition in the sale of plywood products in interstate commerce; have unreasonably restrained such commerce in plywood products; and have constituted unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act."

Accordingly, the Commission issued its order (Tr. 123–128) commanding petitioners to "cease and desist from entering into, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said [petitioners], or between or among any one or more of said [petitioners] and other producers or sole distributors of plywood

products for other producers not parties hereto, to do or perform any of the following acts or things:"

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms, or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices, and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the [petitioner] Association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir Plywood, or any one thereof, unless such statistical information as is made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding and securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, for the preparation, adoption, or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir

Plywood considered or recognized by [petitioners] as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the [petitioner] Association from maintaining mailing lists of buyers and distributors of Douglas Fir Plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

(a) Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

(b) Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir Plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such plywood conclusions and findings in reference to such classification;

8. Selling only under delivered price basis, and in conjunction therewith:

(a) Computing the rail freight rate from any point other than the point of origin of the shipment;

(b) Using a uniform schedule of estimated weights;

(c) Adding a uniform net addition on sales made in the primary market;

> 9. Refusing to ship to East Coast and Gulf points on any basis other than a C. I. F. basis with uniform net additions to the ocean freight rate.

The Commission further ordered (Tr. 127–128) that—

> nothing contained herein shall be deemed to affect lawful relations, including purchase and sale contracts and transactions, among the several [petitioners], or between a [petitioner] and its subsidiaries, or between subsidiaries of a [petitioner], or between any one or more of said [petitioners] and any others not parties hereto, and not in unlawful restraint of trade.

Petitioners thereafter timely filed in this Court their petitions to review the above order.

III

ISSUES PRESENTED

1. Did the Commission correctly find from the record that the capacity, tendency and results of the unlawful combination and conspiracy admitted by petitioners "have been, and now are," to restrain trade in the plywood industry?

2. Is the Commission authorized to order the cessation of unfair methods of competition despite a plea of their abandonment?

3. Did the Commission correctly name in its order petitioner Wallace E. Difford, who as managing director of petitioner Douglas Fir Plywood Association initiated and supervised much of the illegal conduct engaged in by petitioners, notwithstanding that he is no longer employed by the petitioner association?

4. Was it proper for the Commission, in 1948, to proceed against a price-fixing scheme constituting an unfair method of competition, lawfully commenced under a code adopted by the plywood industry pursuant to the National Industrial Recovery Act, which was invalidated by the Supreme Court of the United States in 1935?

We contend that all of these questions should be decided affirmatively.

IV

ARGUMENT

Introductory Statement

Beyond summarizing the events culminating in the Commission's action here on review, we pass without extensive comment a possible want of good faith on petitioners' part. In assailing an order whose terms their attorneys had earlier approved and which they made one of the conditions surrounding their filing of admission answers, petitioners are now doing their best to wriggle out of a settlement reached after months of conference and consultation and because of which the Commission waived its customary formal hearings for the reception of testimony and other evidence. The record herein and the Commission's correspondence files—as counsel for petitioners well know—disclose that the entire arrangement represented a compromise and it was never contemplated that the admission answers should not form the basis for an inhibition against the continuation or repetition of petitioners' illegal conduct.

Petitioners' admission answers to the amended complaint expressly recited:

> Any and all admissions of fact made by respondent herein are made solely for the purpose of this proceeding, the enforcement or review thereof in the Circuit Court of Appeals, and for any review in the Supreme Court of the United States, or for any other proceeding in enforcement of the order to be entered herein, or to recover any penalty for violation thereof which may be brought or instituted by virtue of the authority contained in the Federal Trade Commission Act, as amended, and for no other purpose, but reserving the right of a hearing with oral argument and filing of briefs before the Commission as to what order, if any, should be issued upon the facts hereby admitted.

The language just quoted reserves to petitioners the right to argue *to the Commission,* on any grounds whatever, that an order should not issue on the admitted facts, but further than that it clearly states that the purpose of the admissions—and this means admissions against interest, *not self-serving declarations*—is to provide a basis for an order, the review thereof, and possible enforcement proceedings. The language follows that usually contained in admission answers in Commission cases. Read as an entirety, the recital aims at limiting the admissions against interest to this Federal Trade Commission proceeding, thereby forestalling their use in, say, a Sherman Act prosecution or a civil treble-damage suit.

The following narrative of the course of the proceedings below illustrates the mutually concessive and consentual character of the arrangement finally adopted by counsel for both sides to conclude the

controversy without the expense and inconvenience of a trial of the issues:

The original complaint was issued on March 1, 1948 (Tr. 5, 23). Most of the petitioners filed answers avoiding or traversing generally the material allegations of the complaint in April and May of 1948 (Tr. 27, 32; R. 52, 84, 98, 112, 117, 121, 125, 129, 133, 137, 141, 169, 174). Conferences on the West Coast and a voluminous correspondence between the Commission's and petitioners' attorneys ensued during the following months, anticipating a mutually satisfactory settlement without formal trial. It proved difficult to arrive at terms of settlement that would suit all parties involved, but the trial examiner repeatedly granted continuances, requested by both sides, in an effort to promote settlement (Off. Tr. 7–8, 15, 31, 42).[3] These postponements were granted throughout the rest of 1948 and the first part of 1949.

Both sides wanted a negotiated settlement (see colloquies, Off. Tr. 7, 14). Two alternate modes of settlement suggested themselves: the filing of admission answers to form the basis of a formal order to cease and desist, and an informal stipulation to cease and desist (see colloquy, Off. Tr. 37–38). The latter means was finally rejected because of the unfeasibility of formulating a single written instrument acceptable to all petitioners (see colloquies, Off. Tr. 51, 65–66). It was then proposed by Commission counsel, with the foreknowledge and consent of petitioners' counsel, that the Commission issue an amended com-

[3] "Off. Tr." refers to the official typewritten transcript of proceedings before the trial examiner.

plaint (see Memorandum Proposing Disposition, Appendix A, pp. 1a–5a, *post*), omitting certain parties named as respondents in the original complaint but not otherwise departing from the original allegations. This was done (Tr. 35).

Petitioners duly filed admission answers to the new complaint (Tr. 59, 63, 64, 66, 68, 74, 75, 77, 79, 82, 84, 87, 94) but before such filing, a tentative form of cease-and-desist order was drawn up by Commission counsel and submitted to the opposition, and its provisions discussed by all of them (See Memorandum Proposing Disposition, Appendix A, pp. 1a–5a, *post*). Counsel for the Commission agreed to recommend to the Commission that this draft be made the basis of final settlement and that the final cease-and-desist order follow its wording exactly. This was done. (See Memorandum Proposing Disposition, Appendix A, pp. 5a–8a, *post*).

The arrangement—apparently wholly satisfactory to petitioners' counsel at the time, for the record shows no objection by them—was formally announced to the Commission by counsel supporting the amended complaint in their "Memorandum Proposing Disposition," filed on October 25, 1949 (Appendix A, *post*), which recited, *inter alia,* that—

> an order to cease and desist would be justified and that one should be issued prohibiting the carrying on of the course of action alleged in the amended complaint to have been carried on by respondents and alleged to be violative of Section 5 of the Federal Trade Commission Act. In that connection the Commission is

> advised that counsel in support of the complaint informed counsel for respondents of this conclusion. *In fact, during the course of the aforesaid conferences, counsel in support of the complaint discussed with counsel for respondents the provisions of the order to cease and desist which counsel in support of the complaint would be willing to recommend to the Commission that it include and make a part of its order to cease and desist. After counsel for respondents were thus advised concerning those provisions they informed counsel in support of the complaint of their willingness to file the aforesaid admission answers to the amended complaint herein on the basis of the understanding that counsel in support of the complaint would thereafter recommend to the Commission that it include in its order to cease and desist the prohibitory provisions referred to above.* * * * It is the recommendation of counsel in support of the complaint that the Commission issue an order to cease and desist and that it include in such order the provision set forth in attached Appendix A.

In view of the foregoing it could hardly have come as a surprise to petitioners that the proceeding eventuated in an order to cease and desist. On the other hand, petitioners' subsequent action in seeking judicial review of an order reached by negotiation for the purpose of eliminating expensive, drawn-out hearings was a move totally unexpected by the Commission. Nevertheless, we submit that the order was properly issued, is legally sound, and should be affirmed and enforced by this Court.

A. The Commission correctly found that the capacity, tendency and results of the unlawful acts admitted by petitioners in their several answers to the amended complaint "have been *and now are*" to restrain in various ways trade in the plywood industry

1. There is nothing in the record to show, or even warrant a reasonable inference, that petitioners have finally abandoned their conspiracy

We must emphatically direct the Court's attention to the complete lack of foundation for petitioners' assumption that the record discloses abandonment of the conspiracy found by the Commission, from petitioners' own admission answers, to have existed among them for about six years immediately prior to 1941. Throughout the briefs of all but one petitioner abandonment is treated as if it had been proved.[4] Petitioners *argue* abandonment, to be sure, but the data from which the Commission made its findings of fact contained nothing to that effect beyond petitioners' general traverse of material allegations not admitted. Only the brief of M. & M. Wood Working Company (p. 6) states the true issue:

> This case seems to involve a conflict of presumptions. There being no evidence in the record after 1941, the Commission seems to rely upon a presumption that unlawful activity, once shown, continues. This petitioner and other members of the industry seem to rely upon a presumption of change—that a condition existing more than ten years ago must have

[4] Brief for Oregon-Washington Plywood Company, pp. 12–14; Brief for Wheeler Osgood Company, pp. 6, 8, 9; Brief for Douglas Fir Plywood Association, pp. 6, 8, 9, 11, 13, 14, 15, 19, 21, 24; Brief for Washington Veneer Corporation, pp. 3, 5, 6, 7, 14.

been changed, if it has not been completely abandoned.

While we do not go so far as to say there is any presumption that all unlawful activity, once shown, continues, the authorities clearly show that to render a case moot in the field of conspiracy, and particularly conspiracy to restrain trade, there must be persuasive—if not conclusive—proof of abandonment. (See discussion at pp. 30–40, *post.*)

The data from which the Commission decided this case consisted of the amended complaint, petitioners' answers thereto, Commission counsel's memorandum proposing disposition, and the proposed form of order to cease and desist submitted to petitioners and approved by them, certain petitioners' briefs and memoranda, and the oral argument of counsel—and nothing more. (Preamble to Findings, Tr. 97–98.)

By their answers petitioners admitted the existence of a conspiracy, as alleged by the amended complaint, and its duration from 1935 to 1941 (except for petitioner Oregon-Washington Plywood Company, which admitted the allegations but denied their continuance or existence after August 31, 1941, and except for petitioner Wallace E. Difford, who admitted participation in the conspiracy only for a substantial part of the period between March 8, 1938, and August 1, 1941). Petitioners denied all other material allegations of the complaint.

It is elementary that judicial admissions *against interest,* while technically not evidence, are conclusive *against the pleader.* 20 Am. Jur. 532, Evidence

§ 630; 20 Am. Jur. 460, Evidence § 543; 20 Am. Jur. 469, Evidence § 557; 20 Am. Jur. 1050, Evidence § 1198.[5] Their value, of course, subsists in an elemental principle of human behavior—that sane human beings, not under compulsion, are not likely to distort facts to their own detriment. This is the only justification for treating admissions as having evidentiary force, and mere self-serving declarations in pleadings, favorable to the pleader in their purport, cannot be considered as conclusive evidence on the pleader's own behalf. 20 Am. Jur. 470, Evidence § 558; 20 Am. Jur. 1051, Evidence § 1199.

Petitioners admitted the existence of an illegal conspiracy for some years up to 1941. They reiterate their admissions in their briefs. Their answers went on to deny all the other material allegations of the Commission's complaint. Thus their pleadings had the effect of admitting the illegal acts up to 1941 and of denying that they continued thereafter.

Manifestly, the Commission acted within the bounds of reason and judicial propriety in treating as conclusively shown only *the admissions* pleaded by petitioners. But petitioners' self-serving denials of the continuation of their illegal arrangement beyond 1941 or its existence at the time of the complaint, contained in the answers, are not themselves admissions and were in no way probative of the ultimate issues the Commission had to decide.

The answers were not—it seems hardly worth mentioning—stipulations of fact between litigants. They

[5] See 9 Wigmore, Evidence (3d ed.), §§ 2590, 2591.

were petitioners' own pleadings. What these answers admitted against the interest of petitioners was rightly taken by the Commission to be final and conclusive, requiring no proof. The issues raised by their denials, as distinct from their admissions, remained for the Commission to resolve from *all* the pertinent data before it. Hence it appeared from petitioners' answers that they had participated in practices flagrantly violative of the Federal Trade Commission Act for about six years. There was nothing to show abandonment.

The nature of petitioners' participation in negotiations leading to the issuance of an order without the reception of testimony and other evidence, and their filing of admission answers only on condition that the final cease-and-desist order follow the exact wording of a tentative proposed order drafted with their knowledge and cooperation, constitute, we feel, the equivalent of a consent that an order be issued. In a similar situation the Seventh Circuit, in *National Candy Co.* v. *Federal Trade Commission,* 104 F. 2d 999 (1939), *cert. denied,* 308 U. S. 610 (1939), said:

> * * * By petitioner's failure to deny, and its express admission of the allegations of the complaint, it waived all questions except the sufficiency in law of the allegations of the complaint. Likewise, its consent that the cease and desist order might issue waived every defense except a challenge of the jurisdiction of the Commission over the subject matter. * * * [*Id.* at 1006.]

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2. By its nature, a conspiracy to restrain trade contemplates continuity of purpose and results, and its effectiveness depends thereon. Hence, in a Federal Trade Commission proceeding brought to "prevent" unfair methods of competition, continuance of such a conspiracy is properly presumed in the absence of a clear showing of abandonment

Petitioners in no way challenge the Commission's findings insofar as they postulate petitioners' participation in an unlawful price-fixing arrangement during the years 1935–1941 (1938–1941, in the case of petitioner Difford, and an indeterminate period up to 1941, in the case of petitioner Oregon-Washington Plywood Company). We have, nevertheless, set forth in detail in our statement of the case the allegations of the amended complaint and the findings of the Commission, purposely to acquaint the Court with the intricacy and complexity of petitioners' scheme to fix prices, carve up markets, and otherwise dominate the plywood market to the disadvantage of their competitors and the general public. Such systematic, well thought-out restraint, we submit, once it comes into operation, is self-perpetuating; it does not vanish of its own accord. The Commission would be highly remiss in its duty to the public to assume that petitioners' collusive system, in some mysterious fashion not shown by the record and unexplained by petitioners, folded its tent and silently stole away in 1941, never again to plague a free market in plywood.

Throughout the discussion which follows we have dealt with petitioners' alleged and admitted misconduct as a *conspiracy,* which their answers confess it to have been, and to save space and undue repetition we have dispensed with the partially synonymous terms "planned common course of action," "under-

standing," "agreement," and "combination," which describe offenses logically included in a conspiracy. All these terms were used in the complaint and the order for exigencies of proof and enforcement.

It is well settled that the phrase "unfair methods of competition" appearing in Section 5 of the Federal Trade Commission Act (footnote 1, p. 2, *ante*) includes conduct that may constitute a violation of the Sherman Act. Furthermore, the history of the Federal Trade Commission Act "shows a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the Federal District Courts but also to supplement that enforcement through the administrative process of the * * * Commission." *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 691–693 (1948). Hence, in arguing against the contentions made herein by petitioners, we rely not only on decisions involving the review of Federal Trade Commission, and other administrative orders, but also on decisions involving court decrees abating Sherman Act violations.

Once factually established, a conspiracy is presumed to continue until the contrary is shown. This Court, along with other Federal courts of appeals and the Supreme Court of the United States, has so held. *Coates* v. *United States,* 59 F. 2d 173, 174 (C. A. 9, 1932), *Marino* v. *United States,* 91 F. 2d 691, 695 (C. A. 9, 1937, *cert. denied sub nom.* Gullo v. United States, 302 U. S. 764 (1938); *Local 167* v. *United States,* 291 U. S. 293, 297–298 (1934); *United States* v. *Perlstein,* 127 F. 2d 789, 798 (C. A. 3, 1942), *cert.*

denied, 317 U. S. 678 (1942); *Miller* v. *United States,* 277 Fed. 721, 725 (C. A. 4, 1921); *Nyquist* v. *United States,* 2 F. 2d 504, 505 (C. A. 6, 1924), *cert. denied,* 267 U. S. 606 (1925); *McDonald* v. *United States,* 89 F. 2d 128, 133 (C. A. 8, 1937), *cert. denied,* 301 U. S. 697 (1937), *rehearing denied,* 302 U. S. 773 (1937); *Mansfield* v. *United States,* 76 F. 2d 224, 229 (C. A. 8, 1935); *United States* v. *Wilson,* 23 F. 2d 112, 117 (N. D. W. Va. 1927).

Furthermore, the Federal Trade Commission is authorized to proceed against a conspiracy once it has been formed, despite subsequent miscarriage of the unlawful concerted activity. In *Keasbey & Mattison Co.* v. *Federal Trade Commission,* 159 F. 2d 940 (C. A. 6, 1947), which arose from a Commission proceeding against a price-fixing conspiracy, the petitioners urged that "the uncontradicted evidence—[in the case at bar there is no comparable evidence]—shows that there was competition in the unpatented materials which in fact resulted in undercutting the prices of the patented materials to such an extent that all of the petitioners except Carey *canceled their licenses a considerable period prior to the filing of the complaint.*" [Our italics.]

The Sixth Circuit, *Id.* at 951, rejected the contention of abandonment on this wise:

> * * * These circumstances, however, do not relieve the petitioners of liability for their acts, which constituted a violation of the Federal Trade Commission Act, * * *. It is the combination or conspiracy in restraint of trade or commerce which the Act prohibits "whether

> the concerted activity be wholly nascent or abortive on the one hand or successful on the other." *United States* v. *Socony-Vacuum Oil Co.* [310 U. S. 150 (1940)]. The fact that the projects charged and proved never came to fruition is not material, for it is the object of the Federal Trade Commission Act to reach in their incipiency combinations which could lead to undesirable trade restraints. *Fashion Originators' Guild* [*of America Inc.*] v. *Federal Trade Commission* [312 U. S. 457], 466. * * *

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.* * * * Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the [Sherman] Act." *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 223–224 (1940). It would be passing strange, indeed, if he Federal Trade Commission, acting in the public interest under the broad terms of its own statutory commandment to "*prevent* unfair methods of competition," could not properly use its prospective remedial powers (the only means of enforcing its Act) to forbid for the future a confessed conspiracy that, under the Sherman Act, would have resulted in criminal conviction.

If they are to be at all effective, conspiracies in restraint of trade presuppose a continuous performance of the activities essential to their success. There

is a substantial difference between them and conspiracies to perform a single, isolated act, say, to rob a bank. This distinction was readily perceived by the Supreme Court in *Local 167* v. *United States,* 291 U. S. 293 (1934), wherein it declared:

> The conspiracy [to restrain and monopolize interstate commerce in poultry] was not for a temporary purpose but to dominate a great and permanent business. It was highly organized and maintained by the levy, collection and expenditure of enormous sums. In the absence of definite proof to that effect, abandonment will not be presumed. [*Id.* at 297, 298.]

Individuals who take part in an unlawful conspiracy have the burden of overcoming the inference of their continuance therein "by proof of acts satisfactorily disclosing a severance of that relation." *Independent Employees Assn.* v. *National Labor Relations Board,* 158 F. 2d 448 (C. A. 2, 1946), *cert. denied,* 333 U. S. 826 (1948). See also *Sperry Gyroscope Co.* v. *National Labor Relations Board,* 129 F. 2d 922, 927, 928 (C. A. 2, 1942). Withdrawal from a conspiracy must be proved by showing some affirmative and effective act. *Boyle* v. *United States,* 259 Fed. 803, 807 (C. A. 7, 1919); *Hyde* v. *United States,* 225 U. S. 347, 369 (1912). "Abandonment will not be presumed and, even though pleaded and presently effective, is no bar to the entry of an enforcement order." *Federal Trade Commission* v. *Wallace,* 75 F. 2d 733, 738 (C. A. 8, 1938).

In view of the nature of the Commission's proceeding and final action, therefore, is it amiss to inquire

just why petitioners so strenuously oppose the issuance of an order, if in and of itself it carries no punitive sanctions and if it is true that they have abandoned all conspiratorial purpose to restrain trade in plywood? The only interpretation that can be made of their stout resistance to an order which only forbids them to violate what has been the law since 1890 is that they are seeking thereby to buy time for a "second bite at the cherry."

Petitioners were under no compulsion to plead admissions to the Commission's charges. The law is plain that, to render an order purposeless, abandonment of the conspiracy must be affirmatively shown, yet petitioners, while admitting that their conspiracy existed for a number of years, have only denied its existence after 1941. They did not avail themselves of the right to introduce evidence to show discontinuance of this scheme or withdrawal therefrom by any particular member, yet they now argue to this Court that the order is invalid *because* there was abandonment—an assumption wholly unwarranted in fact.

We submit, therefore, that the Commission properly found that the capacity, tendency and results of the conspiracy which petitioners admitted was in operation during the period 1935–1941 "have been and now are" to restrain trade.

Petitioner Washington Veneer Corporation concedes in its brief (p. 9) that "there is not much authority on this question * * *." If "this question" be the proposition that abandonment of a conspiracy is to be inferred from a self-serving denial in

an answer to a complaint, without a showing that abandonment has actually taken place, we heartily agree. In the cases that this petitioner cites in its behalf on this point,[6] there was a discontinuance *actually shown* in the record.

The *L. B. Silver Co.* case, 292 Fed. 752 (C. A. 6, 1923), was before the court on an application for a decree of enforcement, a procedure largely outmoded by the Wheeler-Lea Amendment of 1938, which makes Commission orders final after 60 days if not appealed. Whether a court would refuse to grant enforcement or to entertain contempt proceedings or civil penalty suits, unless the Commission could show subsequent violations, has, of course, no bearing whatever here. It would, of course, be futile for the Commission to seek judicial enforcement of its order or penalties for its violation, unless a violation after its issuance could be shown.

Petitioners Douglas Fir Plywood Association *et al.* in Appendix A to their brief have undertaken to distinguish on the facts all cases wherein it was held that discontinuance is no bar to a Commission order. We do not concede the validity of the distinctions drawn, whether on the ground that the lapse of time involved was less than that which ran between petitioners' supposititious abandonment and the issuance of the complaint, or for any other reason. Seven years

[6] *John C. Winston Co.* v. *Federal Trade Commission*, 3 F. 2d 961 (C. A. 3, 1925); *L. B. Silver Co.* v. *Federal Trade Commission*, 292 Fed. 752 (C. A. 6, 1923); *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (C. A. 7, 1944), *cert. denied*, 323 U. S. 730 (1940).

is a short while in the life of an expanding industry supplying a staple commodity.

But, for all that, the opinions cited by petitioners reflect a consistent concern of the courts that, if abandonment is to be a bar, it be established by a clear evidentiary showing. For example, in *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307 (C. A. 7, 1919), the petitioner had stated in its answer that it had abandoned its methods and had no intention of resuming them. This, the Court held, did not amount to assurance that petitioner "if it could shake [the Commission's] hand from its shoulder, would not continue its former course," *Id.* at 310, in view of petitioner's resistance to the order on the ground that even if the statute was valid, it had not been violated.

In *John C. Winston Co.* v. *Federal Trade Commission,* 3 F. 2d 961, 962 (C. A. 4, 1925), one of the few cases in which an order was set aside on a showing of abandonment, the Court mentions that "the evidence shows that the company itself had ceased and desisted" and that the company had offered to stipulate never to engage in the practice again. These elements are conspicuously absent from the instant proceeding.

"The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts, which include the attitude of respondent toward the proceedings, the sincerity of its practices and professions of desire to respect the law in the future, and all other facts. * * *

"If the practice has been surely stopped and by the act of the party offending, the object of the pro-

ceeding having been attained, no order is necessary nor should one be entered. If the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate." *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321, 330, 331 (C. A. 7, 1944); *cert. denied,* 323 U. S. 730 (1940).

The foregoing excerpt is cited in four of the five briefs filed herein for petitioners.[7] We think it an altogether fair standard for this Court to apply in measuring the Commission's discretion in the issuance of its order. But the record in the instant matter is devoid of the elements prescribed by the *Dietzgen* decision. As for petitioners' attitude, they are seeking vacation of an order banning illegal practices which they admit having committed and which they have not shown to have been abandoned. As for the sincerity of their practices and professions of desire to respect the law in the future, the language of the Tenth Circuit in *Vaughan* v. *John C. Winston Co.,* 83 F. 2d 370, 374 (1936), is apt:

> If, except for the injunction, Vaughan would have continued to send out defamatory circulars, then the order concededly was proper; if he did not so intend, then he is not hurt by the order. *His appeal from that part of the order indicates it hurts; but it can only hurt if he desires to resume his unlawful acts.* [Italics supplied.]

[7] Brief for Oregon-Washington Plywood Co., p. 11; Brief for Wheeler, Osgood Co. and Northwest Door Co., p. 6; Brief for Douglas Fir Plywood Association et al., p. 18; Brief for Washington Veneer Corp., p. 11.

A similar view was expressed by the Fifth Circuit in *Standard Container Manufacturers' Assn.* v. *Federal Trade Commission,* 119 F. 2d 262, 265 (1941):

> [The contention] that some of the petitioners have gone out of business or have taken bankruptcy may be disposed of *by simply saying that the order is not retrospective, but wholly prospective, in operation and if these petitioners are really out of business to stay, they can take no harm from it.*

The Dietzgen decision, 142 F. 2d 321, 331 (C. A. 7, 1944), held:

'If the practice has been fully stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practices in the future, the order to desist is appropriate."

In just what way can petitioners gain comfort from this test of the Commission's exercise of discretion? Nothing has been done or even said to insure the cessation of the petitioners' conspiracy. Even if price fixing has not been necessary in the seller's market that has prevailed since the end of the Second World War, there is no assurance that petitioners will not revert to their illegal practices whenever it suits their purposes.

In the *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 447–448 (C. A. 2, 1945), upholding a finding of monopoly notwithstanding that the unlawful activities had been halted before suit, the Court, speaking through Judge Learned Hand, said:

> To disarm the court, it must appear that there is no reasonable expectation that the wrong will be repeated. That is not true in the case at bar. Unless we are to grant an injunction, we should not pass upon the issue; if we do not pass upon the issue, we are by no means persuaded that "Limited" when peace comes will not enter into another "cartel" which again attempts to restrict imports. It has insistently argued that the Act does not cover such an agreement; and it alleges that it was forced into the "cartel" if it was to do a European business at all. It may be forced to do so again unless a judgment forbids.

Again, the Second Circuit in *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221, 222 (1950) held:

> It is for the court to say whether the plaintiff shall be compelled to accept his assurance that he will not resume what he should not have begun. After all, no more is involved than whether what the law has already condemned, the court shall forbid; from the fact that its judgment adds to its existing sanctions that of punishment for contempt is not a circumstance to which a court will ordinarily lend a friendly ear.

B. The Commission is authorized to order the cessation of unfair methods of competition regardless of abandonment and regardless of whether such abandonment occurs before or after the issuance of the complaint

Section 5 (a) of the Federal Trade Commission Act empowers the Federal Trade Commission "to *prevent* [not merely stop] persons, partnerships or cor-

porations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce," and Section 5 (b) of the statute provides that "whenever the Commission shall have reason to believe that any such person, partnership or corporation *has been* or is using any unfair method of competition or unfair or deceptive act or practice in commerce," and if it shall appear to be in the public interest, it shall issue and serve its complaint. Thus by express language, the Act contemplates proceedings not only to halt present violations but to prevent the repetition of past ones whenever the public interest so demands.

In speaking of the Commission's duty to *prevent* unfair commercial practices, the Sixth Circuit in *Perma-Maid Co.* v. *Federal Trade Commission,* 121 F. 2d, 282, 284 (1941), said:

> This duty is not discharged by abandoning a complaint upon a showing not clearly made here that the unlawful practices have been discontinued. Such showing constitutes no guaranty that they will not be resumed. * * * The law prescribes one effective method and one only by which the Commission may discharge its duty, i. e., the issuance of an appropriate cease and desist order. The order in no wise injures petitioner and will be an effective aid to it in its efforts to put a stop to the unfair practices.

This Circuit has held that discontinuance of an unfair practice is no ground for setting aside an order to cease and desist that practice. *Juvenile Shoe Co.* v. *Federal Trade Commission,* 289 Fed. 57, 59–60

(1923). The doctrine has been applied over and over again by nearly every United States Court of Appeals. *Corn Products Refining Co.* v. *Federal Trade Commission,* 144 F. 2d 211, 220 (C. A. 7, 1944), *affirmed,* 324 U. S. 726 (1945); *Gelb* v. *Federal Trade Commission,* 144 F. 2d 580, 581 (C. A. 2, 1944); *Stanley Laboratories, Inc.* v. *Federal Trade Commission,* 138 F. 2d 388, 390 (C. A. 9, 1943); *Perma-Maid Co.* v. *Federal Trade Commission,* 121 F. 2d 282, 284 (C. A. 6, 1941); *Standard Container Manufacturers' Association* v. *Federal Trade Commission,* 119 F. 2d 262, 265 (C. A. 5, 1941); *National Silver Co.* v. *Federal Trade Commission,* 88 F. 2d 425, 428 (C. A. 2, 1937); *Federal Trade Commission* v. *A. McLean & Son,* 84 F. 2d 910, 913 (C. A. 7, 1936); *Federal Trade Commission* v. *Wallace,* 75 F. 2d 733, 738 (C. A. 8, 1935); *Fairyfoot Products Co.* v. *Federal Trade Commission,* 80 F. 2d 684, 686–687 (C. A. 7, 1935); *Federal Trade Commission* v. *Good-Grape Co.,* 45 F. 2d 70, 72 (C. A. 6, 1930); *Lighthouse Rug Co.* v. *Federal Trade Commission,* 35 F. 2d 163, 167 (C. A. 7, 1929); *Fox Film Corp.* v. *Federal Trade Commission,* 296 Fed. 353, 357 (C. A. 2, 1924). Pertinent excerpts from the foregoing cases are given in our Appendix B, *post.*

What is more, it is immaterial whether abandonment or discontinuance is accomplished before or after the Commission issues its complaint. *Keasbey & Mattison Co.* v. *Federal Trade Commission,* 159 F. 2d 940, 951 (C. A. 8, 1947); *Deer* v. *Federal Trade Commission,* 152 F. 2d 65, 66 (C. A. 2, 1945); *Moretrench Corp.* v. *Federal Trade Commission,* 127 F. 2d 792, 795 (C. A. 2, 1942); *Hershey Chocolate Corp.*

v. *Federal Trade Commission,* 121 F. 2d 968, 971 (C. A. 3, 1941); *Dr. W. B. Caldwell, Inc.* v. *Federal Trade Commission,* 111 F. 2d 889, 891 (C. A. 7, 1940); *Educators' Assn.* v. *Federal Trade Commission,* 108 F. 2d 470, 473 (C. A. 2, 1939); *Federal Trade Commission* v. *Standard Education Society,* 86 F. 2d 692, 697 (C. A. 2, 1936), *reversed on other grounds,* 302 U. S. 112 (1937); *Arkansas Wholesale Grocers' Assn.* v. *Federal Trade Commission,* 18 F. 2d 866, 871 (C. A. 8, 1927), *cert. denied,* 275 U. S. 533 (1927); *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. 2d 673, 686–687 (C. A. 8, 1926); *Moir* v. *Federal Trade Commission,* 12 F. 2d 22, 27 (C. A. 1, 1926); *Guarantee Veterinary Co.* v. *Federal Trade Commission,* 285 Fed. 853, 859–860 (C. A. 2, 1922); *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307, 310 (C. A. 7, 1919). Pertinent extracts from this line of cases are set forth in our Appendix B, *post.*

The identical doctrine has been declared in cases which arose before other administrative agencies. *National Labor Relations Board* v. *Local 74,* 181 F. 2d 126, 132–133 (C. A. 6, 1950); *Shore* v. *Building and Construction Trades Council,* 173 F. 2d 678, 682 (C. A. 3, 1949); *National Labor Relations Board* v. *Sewell Manufacturing Co.,* 172 F. 2d 459, 461 (C. A. 5, 1949); *Walling* v. *Helmerich & Payne, Inc.,* 323 U. S. 37, 42–43 (1944); *Hecht Co.* v. *Bowles,* 321 U. S. 321, 327 (1944); *Walling* v. *Mutual Wholesale Food & Supply Co.,* 141 F. 2d 331, 334 (C. A. 8, 1944); *Walling* v. *Haile Gold Mines, Inc.,* 136 F. 2d 102, 105 (C. A. 4, 1943); *National Labor Relations Board*

v. *Ford Motor Co.,* 119 F. 2d 326, 330 (C. A. 5, 1941); *Pueblo Gas & Fuel Co.* v. *National Labor Relations Board,* 118 F. 2d 304, 307 (C. A. 10, 1941); *National Labor Relations Board* v. *Penna. Greyhound Lines,* 303 U. S. 261, 271 (1938); *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 230 (1938). Excerpts from certain of these cases appear in Appendix C, *post.*

C. The Commission properly ordered petitioner Wallace E. Difford to cease and desist from the illegal practices in which he admitted having participated

The Commission found that individual petitioner Difford had served as managing director of petitioner Douglas Fir Plywood Association and as such initiated, supervised and carried out many of the policies of that organization; that he had worked with all the petitioners in the activities complained of by the Commission; and that he severed his employment with the association on June 30, 1946, and is now in the lumber business for himself (Tr. 108). It may well be, as Difford's counsel argues (Brief for Douglas Fir Plywood Association *et al.,* p. 22) that his present business of lumber distribution is "wholly unrelated to the functions of the Plywood Association," but this is merely a bald assertion lacking support in the record. We contend that the Commission was well within the bounds of reasonable inference in supposing that his present situation is not so unrelated to his previous activity as to warrant dispensing with all safeguards against the resumption of his old practices.

Petitioner Difford places particular reliance on the District Court decision rendered in *United States* v. *William S. Gray & Co.*, 59 F. Supp. 665 (N. Y. 1945), which, his counsel argues, is in point (Brief for Douglas Fir Plywood Association *et al.*, p. 23). We fail to see an all-fours analogy. The District Court, trier of the facts, found from affidavits submitted in support of a motion for summary judgment, that the individual defendant, formerly a district manager of the defendant corporation's plant in Michigan, had accepted employment as a chemical engineer with a New York City concern having no connection with the defendant corporation. It concluded (*Id.* at 666) that there was no indication that individual defendant would resume his former practices, particularly since his former employer had been dissolved.

Had petitioner Difford's former employer, petitioner Douglas Fir Plywood Association, been dissolved, had Difford left the lumber industry, had he departed the scene of his earlier activities, gone to a distant city, and taken other salaried employment there, the two cases might be nearer in their facts and we might be prepared to admit that there would be small likelihood of Difford's resuming his old practices. As it is, he remains in Seattle and is still in the lumber trade, as an independent businessman at liberty to set his own policies. There has been no factual showing that he has no relations with his former associates in the illegal conspiracy. We, therefore, respectfully urge that for the sake of exigencies of

enforcement and to insure that the order to cease and desist be fully effective, the prohibitions must apply to petitioner Difford.

D. It was proper for the Commission, in 1948, to proceed against a price-fixing conspiracy constituting an unfair method of competition, lawfully commenced under a code adopted by the plywood industry pursuant to the National Industrial Recovery Act, which was invalidated by the Supreme Court of the United States in 1935

Petitioners Wheeler, Osgood Co. and Northwest Door Company advance the highly implausible argument (Brief, pp. 7–8) that the Commission's order to cease and desist "condemns these petitioners for acts originating" in the National Industrial Recovery Act. They then go on to talk about entrapment, the plain implication being that since the National Industrial Recovery Act permitted the fixing of minimum prices they ought to be excused and pardoned for continuing such pricing for six years after that statute was invalidated.

The argument is not novel. It was advanced in *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321 (C. A. 7, 1944), *cert. denied* 323 U. S. 730 (1944), and the court made short work of it (*Id.* at 328–329), saying:

> It was argued with some emotion that petitioners were endeavoring to carry out the President's wishes and maintained prices and avoided competition of the cut-throat variety so rampant in 1932 and 1933. This was the object of the [National Recovery Administration] and although the vital parts of the [National Industrial Recovery Act] were striken

> down by the decision in *Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935), it was still a patriotic duty of all the competitors in the industry, so petitioners say, to do voluntarily what they could not be compelled to do legally.
>
> There are at least three reasons why this argument must be rejected. First, and foremost, are the Sherman Anti-Trust Act and the Federal Trade Commission Act. The teeth of the Sherman Act were drawn by the operation of the N. R. A. What was before illegal and criminal misconduct was not so under the N. R. A. The prohibitions against combinations in restraint of trade were lifted. When the N. R. A. was invalidated by judicial pronouncement of the Supreme Court, the Sherman Act and the F. T. C. Act again became unrestrainedly operative and their restrictions against combinations again governed industries engaged in interstate commerce.
>
> What was won by killing the N. R. A. was a reawakened or reborn Sherman Act and F. T. C. Act. The Sherman anti-trust [Act] and the F. T. C. Act arose from the same grave in which the N. R. A. was buried.

The Supreme Court earlier took the same view in an anti-trust case, *United States* v. *Socony-Vacuum Co.,* 310 U. S. 150, 227–228 (1940).

The demise of the National Recovery Administration received widespread publicity. Thereafter petitioners were under no compulsion to continue activities formerly required by the NRA code for the plywood industry. The argument that their restrictive pricing originated pursuant to an act of Congress

and hence there has been "entrapment" of petitioners by the government is therefore manifestly without merit and should be rejected forthright.

V

CONCLUSION

We remind the court that an order to cease and desist trade restraints, like an anti-trust decree, is prospective and remedial—not retroactive or punitive. See *Penna. Co.* v. *United States,* 236 U. S. 351, 361 (1915) and *National Labor Relations Board* v. *Mackay Co.,* 304 U. S. 333, 351 (1938). Like the civil anti-trust decree, it is directed against the renewal or continuation of illegal acts. It does not punish for past violations (unless a command to obey the law is punishment). It is a means of assuring the public and others harmed by past violations that should such illegal acts be continued or repeated, graver measures will follow. See *United States* v. *National Assn. of Real Estate Boards,* 339 U. S. 485, 493n (1950). Furthermore, the Commission is not the judge of whether an order, after issuance, has been violated. Suits for civil penalties are instituted by the Justice Department in a United States District Court, where due process will run its course—before a jury if the defendant so elects. If violation is shown, it is the Court that will assess money penalties.[8] Where an order of the Commission has been affirmed by a United States Court of Appeals, enforcement may also go forward by contempt proceedings before that Court.

[8] Federal Trade Commission Act, §§ 5 (l), 52 Stat. 111; 15 U. S. C., § 45 (l).

But in both modes of enforcement, the fact of violation and the amount of the fine are matters for judicial determination and are not settled by administrative action.

The foregoing should be borne in mind in considering the merits of petitioners' argument that a plea of abandonment of a conspiracy to restrain trade renders an order purposeless and thus ousts the Commission of jurisdiction. Prospective, remedial orders must be as effective and as fair as possible in preventing continued or future violations. *United States* v. *National Lead Co.,* 332 U. S. 319, 338, 348 (1947); *International Salt Co.* v. *United States,* 332 U. S. 392, 401 (1947).

The instant matter was heard solely on pleadings, briefs, oral argument, and the Memorandum Proposing Disposition (Appendix A, *post*). The Commission charged an illegal conspiracy and other unlawful acts in restraint of trade in the plywood industry, and petitioners admitted having engaged in these violations of the Federal Trade Commission Act for some years up to 1941. The corporate petitioners still manufacture, sell, and distribute plywood. They still maintain their trade association and their information bureau—central headquarters of their systematic endeavor to stifle a free market in plywood. The association and the bureau not only survive but are petitioners before this Court, now contesting the Commission's power to halt these practices for all time.

Can it reasonably be said that from the data before the Commission there appears so strong a certainty

of petitioners' repentance for past misdeeds and so comforting an assurance of their high resolve to obey the law hereafter, that the public does not need the protection afforded by an effective and enforceable cease-and-desist order? If the Commission should again receive complaints from plywood dealers that petitioners are resorting to collusive, restrictive practices, must it retrace the long, tortuous path of preliminary investigation, study, conferences between counsel, drafting of a complaint, hearings, brief-writing, oral arguments, formulation and issuance of an appropriate order, and possibly an appeal to a United States Court of Appeals and the Supreme Court before it can even ask the Department of Justice to seek civil penalties against the very practices which petitioners have already expressly admitted engaging in for a period of years? Are petitioners to be vouchsafed another go at monopolistic business methods before they can be finally and effectively brought to book? We vigorously contend that this Court should answer all these questions in the negative.

It is submitted that the Commission's findings as to the facts are fully supported by the record and that its order to cease and desist was properly issued. The Commission, therefore, prays that the petitions to review be dismissed and that, pursuant to the statute,[9] the Court enter its decree affirming the Commission's

[9] "To the extent that the order of the Commission is affirmed, the Court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, § 5 (c), 52 Stat. 113; 15 U. S. C., § 45 (c).

order and commanding petitioners to obey the same and comply therewith.

Respectfully submitted.

W. T. KELLEY,
General Counsel,
JAMES W. CASSEDY,
Assistant General Counsel,
ALAN B. HOBBES,
Attorney,
Attorneys for Federal Trade Commission.

WASHINGTON, D. C., *September 1951.*

APPENDIX A

[Caption omitted]

[246][1] MEMORANDUM PROPOSING DISPOSITION

This is a proceeding arising under Section 5 of the Federal Trade Commission Act. The original complaint was issued by the Commission March 1, 1948, in which respondent Douglas Fir Plywood Association, its officers and a number of its members who were engaged in the production and interstate sale of plywood were charged with having established and of maintaining an unlawful price fixing combination. Respondent answered denying in general the charges of the complaint. Hearings were scheduled to commence in Seattle, Washington, on March 22, 1949. However, before the first witness was called, counsel for respondents opened negotiations with counsel in support of the complaint with a view to resolving the issues of fact without the necessity of taking testimony.

The ensuing conferences between counsel supporting the complaint and counsel representing respondents developed information which convinced counsel supporting the complaint that the complaint should be amended so as not to include a number of the parties respondent. The said information showed that some of the parties named in the original complaint had gone out of business. The information developed during the course of those conferences also disclosed that others had either entered business or become

[1] Bracketed numerals are page numbers of the record.

affiliated with the respondent association so close to the date of the issuance of the original complaint that it did not appear they had participated in the alleged unlawful activities. In that connection it is pointed out that the evidence showing participation in the alleged unlawful activities was secured during the course of field investigations conducted well in advance of the date of the issuance of the original complaint. Circumstances relating to World War II prompted reliance, in part, upon evidence covering actions antedating the war.

The other substantial difference in the charges set forth in the amended complaint from those which had been stated in the original complaint is in that part of paragraph seven where it is alleged in the original complaint that respondents "from prior to January 1936 to the date of this complaint have engaged [247] in an understanding, agreement * * *" etc., and where it is alleged in the amended complaint that respondents "and each of them, during the period of time, to-wit, for a substantial portion of the period of time since prior to January 1936, have engaged in an understanding, agreement, combination, * * *", etc.

During the course of the aforesaid conferences counsel representing the respondents informed counsel in support of the complaint that if the latter should recommend to the Commission the issuance of an amended complaint providing for changes above indicated, that respondents would then believe the charges sufficiently in accord with the facts as to permit them to file admission answers to such amended complaint and thereby resolve the factual issues in the case. Counsel in support of the complaint, having become convinced that such proposed changes in the fact allegations would be justified and in keeping with

the public interest, recommended to the Commission that an amended complaint issue providing for the changes above indicated.

On May 19, 1949, the Commission issued its amended complaint which contains charges that respondents established and have maintained an unlawful price-fixing combination in violation of Section 5 of the Federal Trade Commission Act, as above indicated.

Answers of all respondents were filed on June 8, 1949, in which the material allegations of fact of the amended complaint were admitted except such admissions by their terms placed the time limits of the conspiracy within the period from May 1935 to August 1941. In their answers respondents reserved the right to file briefs and present argument as to what order, if any, should issue in the case.

The amended complaint names as a corporate respondent Buffelen Manufacturing Co., whose predecessor Buffelen Lumber & Manufacturing was named in the original complaint. The unlawful acts complained of were performed by the latter company, which was dissolved in June 1948. The respondent in the amended complaint was not organized until February 1948, and its majority stockholders did not own any stock in the predecessor company. It is respectfully recommended therefore that the amended complaint and proceeding be dismissed as to respondent Buffelen Manufacturing Co. A motion to this effect was made to the Trial Examiner and granted by him on September 30, 1949, on which date the record was also closed.

Counsel in support of the complaint have concluded that an order to cease and desist would be justified and that one should be issued prohibiting the carrying on of the course of action alleged in the amended complaint to have been carried on by [248] respond-

ents and alleged to be violative of Section 5 of the Federal Trade Commission Act. In that connection the Commission is advised that counsel in support of the complaint informed counsel for respondents of this conclusion. In fact, during the course of the aforesaid conferences, counsel in support of the complaint discussed with counsel for respondents the provisions of the order to cease and desist which counsel in support of the complaint would be willing to recommend to the Commission that it include and make a part of its order to cease and desist. After counsel for respondents were thus advised concerning those provisions they informed counsel in support of the complaint of their willingness to file the aforesaid admission answers to the amended complaint herein on the basis of the understanding that counsel in support of the complaint would thereafter recommend to the Commission that it include in its order to cease and desist the prohibitory provisions referred to above. Said provisions of the proposed order to cease and desist are set forth on attached Appendix A. It is the recommendation of counsel in support of the complaint that the Commission issue an order to cease and desist and that it include in such order the provision set forth in attached Appendix A.

This memorandum, including proposals set forth herein, is submitted as, for and in lieu of the brief in support of the complaint. Therefore, its service is to be taken with the same force and effect as the service of a document entitled "BRIEF IN SUPPORT OF THE COMPLAINT", particularly with reference to the provision in Rule XXIV of the Commission's Rules of Practice fixing the time within which brief may be filed on behalf of a respondent.

Should any respondent file a brief or offer argument in opposition to the proposed order to cease and

desist, as submitted herewith, counsel supporting the complaint will probably ask for leave to file such reply brief and present such argument as will appropriately and fully cover each of the issues of law or fact contested.

Respectfully submitted.

[S] EVERETTE MACINTYRE,
[S] LEWIS F. DEPRO,
Counsel Supporting the Complaint.

[Appendix A to the foregoing memorandum]

[249] PROPOSED ORDER TO CEASE AND DESIST

IT IS ORDERED THAT respondent Douglas Fir Plywood Association, a corporation, its officers, members of its management committee, agents, representatives and employees; respondent Douglas Fir Plywood Information Bureau, a voluntary organization, its officers, agents, representatives and employees; Harrison Clark, individually, and as an officer of said Association, his representatives and employees; and the corporate respondents Associated Plywood Mills, Inc., Elliott Bay Mill Company, Harbor Plywood Corporation, M & M Wood Working Company, Northwest Door Company, Oregon-Washington Plywood Company, United States Plywood Corporation, Vancouver Plywood & Veneer Company, Washington Veneer Company, West Coast Plywood Company, The Wheeler, Osgood Co. and Anacortes Veneer, Inc., individually and as members of and subscribers to said respondent Association, their respective officers, agents, representatives and employees; Robinson Plywood and Timber Company, Pacific Mutual Door Company, and Weyerhaeuser Sales Company, individually, their respective officers, agents, representatives and employees; and Wallace E. Difford, an individual,

his agents, representatives, and employees, in or in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of Douglas Fir Plywood, do forthwith cease and desist from entering into or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and other producers or sole distributors for other producers not parties hereto, to do or perform any of the following things:

1. Fixing, establishing or maintaining uniform prices, and in connection therewith, uniform discounts, terms or conditions of sale for any kind or grade of Douglas Fir Plywood, or in any manner fixing or establishing any prices and in connection therewith, discounts, terms, or conditions for sale of such plywood;

2. Restricting or curtailing the production of Douglas Fir Plywood;

3. Compiling, exchanging, or disseminating, between and among members of or subscribers to the respondent Association statistical information in respect to the production, sales, shipments, and orders on hand of Douglas Fir plywood, or any one thereof, unless such statistical [250] information as is made available to members or subscribers is readily, fully, and on reasonable terms made available to the purchasing and distributing trade, and where the identity of the manufacturer, seller, or purchaser cannot be determined through such information, and which has not the capacity or tendency of aiding in securing compliance with announced prices, terms, or conditions of sale;

4. Preparing, adopting, or using any basic price list at which Douglas Fir Plywood is to be sold which contains uniform net extras or additions to be charged thereon, or the preparation, adoption or use of uniform net extras or additions in conjunction with a basic price list;

5. Preparing, maintaining, or circulating any list or classification of buyers of Douglas Fir plywood considered or recognized by respondents as "jobbers," "wholesalers," or "dealers," or any similar list or classification of buyers; provided that nothing contained in this Paragraph 5 shall prevent the respondent Association from maintaining mailing lists of buyers and distributors of Douglas Fir plywood when the Association shows that such lists are solely for trade promotion purposes;

6. Adopting and using a plan of distribution which includes one or more of the following:

a. Issuance of a uniform net dealers' price list carrying uniform prices on different quantities and a uniform cash discount;

b. Adoption of uniform definitions of classes of buyers, and providing for the granting of a uniform discount under uniform prescribed conditions as to who may receive and under what conditions same may be granted;

7. Adopting and using any plan which includes a classification of buyers of Douglas Fir plywood on the basis of entitlement to price or discount, or communicating to producers or distributors of such plywood conclusions and findings in reference to such classification;

8. Selling only on a delivered price basis, and in conjunction therewith;

a. Computing the rail freight rate from any point other than the point of origin of the shipment;

b. Using a uniform schedule of estimated weights; [251]

c. Adding a uniform net addition on sales made in the primary market;

9. Refusing to ship to East Coast and Gulf points on any basis other than a C. I. F. basis with uniform net additions to the ocean freight rate;

10. Nothing contained herein shall be deemed to affect lawful relations, including purchase and sales contracts or transactions, between respondents, or between a respondent and its subsidiaries, or between subsidiaries of a respondent, or between any one or more of said respondents and any others not parties hereto, and not in unlawful restraint of trade.

APPENDIX B

Holdings to the Effect That Abandonment of an Unfair Trade Practice Does Not Bar Proceedings by the Federal Trade Commission

ABANDONMENT AFTER COMPLAINT

Corn Products Refining Co. v. *Federal Trade Commission,* 144 F. 2d 211, 220 (C. A. 7, 1944), *affirmed,* 324 U. S. 726 (1945):

> Petitioners assert that they and the two companies have already agreed to eliminate the covenant to purchase entire requirements from petitioners and the latter insist, therefore, that they have not disobeyed the order with respect to these contracts. But there is no proof of this averment; no showing of desistance or compliance. The claim merely presents a question of fact without any showing in the record to justify any review by us.

Furthermore, the mere discontinuance, were it proved, would not justify us in refusing to enforce the order.

Gelb v. *Federal Trade Commission,* 144 F. 2d 580, 581 (C. A. 2, 1944):

> Nor can the petitioners prevail in their argument that the injunction [cease and desist order] may not include forms of advertising which have been discontinued.

Stanley Laboratories, Inc. v. *Federal Trade Commission,* 138 F. 2d 388, 390 (C. A. 9, 1943):

> This offer [to sign a stipulation to cease and desist] was not accepted by the respondent [Commission]; but even if it had been, it would not have constituted a defense to the present proceedings.

Perma-Maid Company, Inc. v. *Federal Trade Commission,* 121 F. 2d 282, 284 (C. A. 6, 1941):

> The Commission further found that upon discovering that certain of its agents had made the statements and representations and had distributed the pamphlets and other literature referred to, petitioner forbade them to make such statements and representations or to distribute such literature; and for more than 1 year had on every occasion, where a violation of its instructions had been called to its attention, discharged or otherwise penalized its agents for violating its orders.
>
> These findings afford no warrant for setting aside the cease and desist order. They do not show that petitioner made any attempt to prevent the unlawful practices prior to the filing of the complaint on November 20, 1937. They do not conclusively show that any effort at any time made by it to prevent the practices was successful. Moreover, an abandonment of the practices, even if clearly shown, does not render

the controversy moot. Such is the latest pronouncement of the Supreme Court (*Federal Trade Commission* v. *Goodyear Tire & Rubber Co.,* 304 U. S. 257, 260). It is the duty of the Commission "to *prevent* persons, partnerships or corporations from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [Our italics.]

This duty is not discharged by abandoning the complaint upon a showing, not clearly made here, that the unlawful practices have been discontinued. Such showing constitutes no guaranty that they will not be resumed. See *Federal Trade Commission* v. *Wallace,* 75 F. 2d 733, 738 (C. A. 8). The law prescribes one effective method, and one only, by which the Commission may discharge its duty, i. e., the issuance of an appropriate cease and desist order. The order in no wise injures petitioner and will be an effective aid to it in its efforts to put a stop to the unfair practices.

Standard Container Mfrs.' Assn. v. *Federal Trade Commission,* 119 F. 2d 262, 265 (C. A. 5, 1941):

> [The contention] that some of the petitioners have gone out of business or have taken bankruptcy, may be disposed of by simply saying that the order is not retrospective, but wholly prospective in operation, and if these petitioners are really out of business to stay, they can take no harm from it. But questions of harm aside, they were in business when the proceeding was properly begun against, and jurisdiction properly obtained over, them; that jurisdiction was not lost by their going out of business or taking bankruptcy; and these facts furnish no ground for setting the order aside.

National Silver Co. v. *Federal Trade Commission,* 88 F. 2d 425, 428 (C. A. 2, 1937):

> The petitioner argues that the custom was changed when the code authority under the N. I. R. A. * * * established a new standard of industry, and that since December 1933, it has not stamped staples or ornamental pieces "sectionally overlaid." Even if this were so, since the petitioner asserts the legal right to use its misleading designation, it is the continuing duty of the Commission to issue, and of the court to affirm and enforce, an order to cease and desist. Here, there is no assurance that there would be a permanent discontinuance. * * * A mere discontinuance of the unfair competition method is no defense, nor is it sufficient to deny the enforcement order particularly where the petitioner insists it has the right to continue.

Federal Trade Commission v. *A. McLean & Son,* 84 F. 2d 910, 913 (C. A. 7, 1936):

> It is further contended by certain of the respondents that the [Commission] failed to find that they had discontinued the manufacture and sale of the chance assortments on August 1, 1934. Discontinuance or abandonment is no defense to the order, for, if true, it would be no guaranty that the challenged acts will not be renewed. * * * The benefit to respondents of an abandonment may be fully protected by their report to the Commissioner as required by the Commission's order.

Federal Trade Commission v. *Wallace,* 75 F. 2d 733, 738 (C. A. 8, 1935):

> Respondent says that he ceased his "admitted activities" at once when this cause was filed. Abandonment will not be presumed and, even though pleaded and presently effective, is no bar to the entry of an enforcement order. A bill not specifically denied is a basis for a decree limited to future acts. There is no guaranty that the acts complained of will not be renewed if the relief prayed is denied.

Fairyfoot Products Co. v. *Federal Trade Commission,* 80 F. 2d 684, 686–687 (C. A. 7, 1935):

> [I]t has been often held that the mere discontinuance of an unfair competitive practice cannot serve to bar a "cease and desist" order based on that discontinued practice particularly where there is no definite assurance that it will not be renewed.

Federal Trade Commission v. *Good-Grape Co.,* 45 F. 2d 70, 72 (C. A. 6, 1930):

> [T]he Commission was authorized to issue the modified order upon the original record * * * and the allegation that respondent has in the meantime changed its practice did not strip the Commission of this power. * * * It is not compelled to assume that respondent had for all time ceased its original methods.

Lighthouse Rug Co. v. *Federal Trade Commission,* 35 F. 2d 163, 167 (C. A. 7, 1929):

> The petitioner contends that it has ceased the practice mentioned in paragraph 3 of the order, and that therefore the Commission should not have included that paragraph. Under the facts shown the Commission was justified in its action in that respect.

Fox Film Corp. v. *Federal Trade Commission,* 296 Fed. 353, 357 (C. A. 2, 1924):

> The fact that the petitioner has discontinued this misrepresentation, and promises a business practice which will forbid the publishing of false advertising in the future, does not deprive the Commission of authority to command the company to desist from such advertising, for it is not obliged to assume that false representations or publications or advertising will not be resumed.

Juvenile Shoe Co. v. *Federal Trade Commission,* 289 Fed. 57, 59–60 (C. A. 9, 1923):

> It is contended that since the petitioner has ceased the use of a label on the cartons in which its shoes are packed and sold, an order to cease placing such labels on the cartons is not warranted: but it does not follow that the order should be dissolved. The [competitor aggrieved by petitioner's misconduct] is not bound to accept the fact of the disuse of the labels as proof that the use will not be resumed in the future, and the mere fact that the petitioner has ceased such use is no reason why injunction should not issue.

ABANDONMENT BEFORE COMPLAINT

Keasbey & Mattison Co. v. *Federal Trade Commission,* 159 F. 2d 940, 951 (C. A. 8, 1947):

> It was not error for the Commission to issue the cease and desist order even though the licenses were canceled by all but one of the petitioners prior to the institution of the action. The Commission is invested with a wide discretion in determining whether or not the practices forbidden will be resumed.

Deer v. *Federal Trade Commission*, 152 F. 2d 65, 66 (C. A. 2, 1945):

> Finally, the fact that use of the "club plan" was abandoned more than a year before the Commission issued its complaint is not a bar to an order to cease and desist, for the Commission has broad discretion to determine whether such an order is needed to prevent resumption of the practice.

Moretrench Corp. v. *Federal Trade Commission,* 127 F. 2d 792, 795 (C. A. 2, 1942):

> [Affirming order banning statement made in] an insignificant advertisement which appeared

> over five years ago and had been discontinued before the complaint was filed. * * * It is not apparent how it is important now to forbid its repetition. Nevertheless, the Commission thought it otherwise, took evidence upon the issue, found that it was untrue—which literally it was—and now presses this part of the order.

Hershey Chocolate Corp. v. *Federal Trade Commission,* 121 F. 2d 968, 971 (C. A. 3, 1941):

> [T]he petitioners contend that the order is invalid in that the practices ordered ceased were discontinued shortly before the complaint was issued, * * *. The Commission would have no power at all if it lost jurisdiction every time a competitor halted an unfair practice just as the Commission was about to act. The practice may have been discontinued but without the Commission's order it could be immediately resumed.

Dr. W. B. Caldwell, Inc. v. *Federal Trade Commission,* 111 F. 2d 889, 891 (C. A. 7, 1940):

> We have considered petitioner's contentions that evidence presented by the Commission dealt with advertising which had been discontinued and not resumed prior to the filing of the charges * * *. [T]he admission of the evidence referred to furnishes no grounds to set aside the order.

Educators' Association v. *Federal Trade Commission,* 108 F. 2d 470, 473 (C. A. 2, 1939):

> Both findings and evidence * * * are to the effect that the petitioners had ceased to violate section 5 of the act in the respects forbidden before the complaint was filed. Because of this, it is argued that paragraphs 2 and 3 of the order should be set aside. We do not understand that discontinuance of practices violative of the act will alone deprive the Commission of power to make an order otherwise

> justified. The act in express terms requires the Commission to issue a complaint if it shall appear to it that such a proceeding would be to the interest of the public whenever "* * * any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce," * * *. Past as well as present practices give the Commission cause for action and their discontinuance is no defense.

Federal Trade Commission v. *Standard Education Society,* 86 F. 2d 692, 697 (C. A. 2, 1936), *reversed on other grounds,* 302 U. S. 112 (1937):

> [T]he respondents allege that as they had already abandoned some of the practices forbidden before the complaint was served, no order should go against them. * * * It has, however, often been decided—certainly when the respondent continued to oppose the order on its merits—that this is no defense to an order to cease and desist.

Arkansas Wholesale Grocers' Assn. v. *Federal Trade Commission,* 18 F. 2d 866, 871 (C. A. 8, 1927), *cert. denied,* 275 U. S. 533 (1927):

> It is urged that many or all of the practices which formed the basis of the findings and order of the Commission had taken place and had been discontinued some time prior to the filing of the complaint. This, if true, would not affect the jurisdiction of the Commission nor the propriety of the order made, since the Commission is not obliged to assume that such practices will not be resumed.

Chamber of Commerce of Minneapolis v. *Federal Trade Commission,* 13 F. 2d 673, 686–687 (C. A. 8, 1926):

> It is contended that the objectionable publications ceased four years before the complaint

> issued and there is no intention to renew them, therefore, there was no basis for the order as to such. It may be that the immediate inciting cause for the publications has vanished or is inactive. However, this is not of itself sufficient to vacate that part of the order although it might be reason for refusing, without prejudice, an application for the enforcement thereof at this time.

Moir v. *Federal Trade Commission,* 12 F. 2d 22, 27 (C. A. 1, 1926):

> In their answer the respondents practically admit that the methods employed * * * constituted unfair methods of competition; but they say that they discontinued these practices early in 1924. * * *
>
> Without the imposition of some legal restraint by the courts not to continue acts found to be unfair methods of competition, the Federal Trade Commission would not be justified in relying upon a mere promise not to engage in these practices.

Guarantee Veterinary Co. v. *Federal Trade Commission,* 285 Fed. 853, 859–860 (C. A. 2, 1922):

> It appears that for several months before the complaint herein was filed against them the petitioners had voluntarily ceased to use [the objectionable wording]. Because of this voluntary discontinuance * * * prior to the filing of the complaint it is urged that this part of the order to cease and desist is unjustifiable and erroneous.
>
> [Treatises and cases discussed.]
>
> In view of the language of the statute ["has been or is using any unfair method"] we are unable to say that the language of the order was used improvidently and was beyond the Commission's authority.

Sears, Roebuck & Co. v. *Federal Trade Commission,* 258 Fed. 307, 310 (C. A. 7, 1919):

> Petitioner insists that the injunctional order was improvidently issued because, before the complaint was filed and the hearing had, petitioner had discontinued the methods in question and, as stated in its answer, had no intention of resuming them. * * * But [the Commission] was required to find from all the evidence before it what was the real nature of petitioner's attitude. * * * So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course.

APPENDIX C

Similar Holdings in Cases Arising Before Other Federal Administrative Agencies

National Labor Relations Board v. *Local 74,* 181 F. 2d 126, 132–133 (C. A. 6, 1950):

> Respondents argue that the case is moot, for the reason that the entire work on Stanley's residence has been completed. It is insisted that the Board could not reasonably anticipate future violations and that its cease and desist order is, therefore, not justifiable. We have heretofore held such argument to be unsound. In *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.* * * * 133 F. 2d 295, 300 [C. A. 6, 1943], this court said: "It has long been the rule that mere discontinuance of an unlawful practice will not relieve the court (or an administrative agency) of the duty to pass upon a pending charge of illegality, when by the mere volition of the parties the illegal practice may be resumed. * * * The order is a continuing one and may be enforced if it

is disobeyed." In *National Labor Relations Board* v. *Toledo Desk & Fixture Co.*, * * * 158 F. 2d 426 [C. A. 6, 1946], we again held that abandonment of an illegal practice does not cause the controversy to become moot, and decreed an enforcement of an order of the National Labor Relations Board.

Shore v. *Building and Construction Trades Council*, 173 F. 2d 678, 682 (C. A. 3, 1949):

> The case is not moot. It is true that the construction of the theater has long since been completed. But there is reasonable ground for belief that there was an unfair labor practice. The defendants say that they are not legally liable for doing what they did and certainly indicate no lack of intention to do the same thing in the future. It is clear as a general proposition of equity that the granting of an injunction is not foreclosed because the act feared has already happened, if there is reasonable grounds for believing that it will be done again. * * * And the defense that there is no longer need for an enforcement order because the complained of practices have, at least temporarily ceased, is one that has been threshed out many times in labor cases where it was the employer and not the union who made the point.

National Labor Relations Board v. *Sewell Mfg. Co.*, 172 F. 2d 459, 461 (C. A. 5, 1949):

> These violations were all found by the Board to have occurred prior to the shutdown of the plant in 1945. [Order issued January 12, 1947.] There were no findings of similar violations after that time. While it may appear that to grant enforcement of the Board's order in this respect, nearly four years later, is unnecessary, it is now settled that a voluntary discontinuance of the violation by the respondent at a

time prior to the institution of proceedings by the Board does not affect the jurisdiction of the Board to make an order barring resumption. The principle supporting this rule is that the Board should have power to prohibit violations in the future as well as to stop present violations.

Walling v. *Helmerich & Payne, Inc.,* 323 U. S. 37, 42–43 (1944):

> Two months after the complaint was filed, but before the case came on for trial, respondent discontinued [the violation]. * * * We hold that the case is not moot under these circumstances. Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power.

Hecht Co. v. *Bowles,* 321 U. S. 321, 327 (1944):

> We agree that the cessation of violations, whether before or after the institution of a suit by the Administrator, is no bar to the issuance of an injunction.

Walling v. *Haile Gold Mines, Inc.,* 136 F. 2d 102, 105 (C. A. 4, 1943):

> It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. * * * This particularly is true where the challenged practices are capable of repetition. * * * Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide to the public agency which may be called upon

> to act again in the same matter. [*Accord: Walling* v. *Mutual Wholesale Food & Supply Co.,* 141 F. 2d 331, 334 (C. A. 8, 1944)].

Pueblo Gas & Fuel Co. v. *National Labor Relations Board,* 118 F. 2d 304, 307 (C. A. 10, 1941):

> Petitioner asserts that the coercive conduct found by the Board to exist had ceased before the completion of unionization of the employees and that therefore no unfair labor practice existed justifying the Board's order. The fact that the coercive conduct had ceased, however, does not prevent the Board from barring its resumption.

National Labor Relations Board v. *Penna. Greyhound Lines,* 303 U. S. 261, 271 (1938):

> [A]n order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made.

Consolidated Edison Co. v. *National Labor Relations Board,* 305 U. S. 197, 230 (1938):

> With respect to industrial espionage, the companies say that the employment of "outside investigating agencies" of any sort had been voluntarily discontinued prior to November 1936 [Board's order issued November 10, 1937], but the Board rightly urges that it was entitled to bar its resumption.

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